circumstances provided by section 3(1)(i) of the Bankruptcy Act, 1967 (hereinafter called the Act). In the present case both the posting on the Notice Board of the High Court in Kuala Lumpur and the advertisements in the *New Straits Times* and *Berita Harian* were effected within the extended period. The appellant applied to set aside the bankruptcy notice on October 6, 1976 also within the extended period. The application eventually came up for hearing before Harun J. at Kuala Lumpur on January 3, 1977 and was dismissed.

In dismissing the application both the appellant's affidavit of October 6 and the respondents' affidavit affirmed by Wong Kong Chung, the Credit Manager authorised by the respondents were considered. The effect of the hearing and determination of the application was that an act of bankruptcy had been deemed to have been committed under the notice (rule 95(2) Bankruptcy Rules). Evidently the court was satisfied that the respondents had obtained a final judgment and the judgment debt had remained unsatisfied. It is also evident that execution thereon had not been stayed and the appellant had not complied with the requirement of the bankruptcy notice. If that be the case the bankruptcy petition presented on January 20, 1977 must be held to have been properly presented against the appellant in accordance with section 5 of the Bankruptcy Act. In that case an act of bankruptcy on which the petition was grounded had occurred within six months before the presentation of the petition.

I now come to the other ground of appeal. The appellants contended that there was a failure by the respondents to comply with section 133(a) of the Act which reads as follows —

"133. For all or any of the purposes of the Act —

(a) a corporation may act by any of its officers authorised in that behalf under the seal of the corporation,"

Section 133(a) should be read with rule 215 of the Bankruptcy Rule which states that —

"Where corporation presents a petition or taken any other action under this Act, the officer of the corporation may act in his own name stating that he is such an officer duly authorised under the seal; but a petition may be presented by the corporation and signed by the officer on its behalf. Any person chosen by the corporation to act as its agent is an officer within section 133 and if duly authorised under seal can act for the corporation."

In the course of submission by counsel for the appellant the attention of this court was drawn to certain forms as set out in Lord Atkin's Court Forms Vol. 7 at pages 230 and 233, Forms 83, 87 and 88. It needs no emphasis that they are recognised but it should be observed that proforma of forms to be used in bankruptcy proceedings is given in the appendix to the Bankruptcy Rules 1969 and be that as it may these forms are intended to be used with modifications as may be necessary. There is clearly no strict requirement that *Atkin's* forms must be rigidly followed.

I now turn to the final ground of appeal. Substantially it is appellant's contention that the Credit Manager did not have the required authority to institute the bankruptcy proceedings on behalf of the respondents in compliance with section 5 of the Act.

I reiterate that Anuar J. dismissed the objection when the same was raised before him at the hearing of the application to set aside the bankruptcy petition. There was clear evidence that Wong Kong Chung, Credit Manager of the respondents was authorised under seal of the corporation on February 3, 1976 and by that authority he was authorised to act or take action for all or any of the purposes of the Act, i.e. in respect of any process or proceeding thereunder. In accordance with such authority he presented the petition in the name of the corporation. It may well be that when he described himself an attorney he was not really giving an accurate description, nevertheless he did have the required authority. The error there was, to my mind, essentially as to form and, would only have amounted to an irregularity insufficient to warrant the proceeding to be invalidated. (See section 131 of the Act.) I would also stress that there was no question of any misrepresentation on the face of the petition. On consideration this court is satisfied that section 133(a) of the Act had been fully complied with.

It may be pertinent at this point to make an observation regarding the power to annul an adjudication order. The law is clear in that the power is discretionary. If the court was of the opinion that the appellant ought not to have been adjudged a bankrupt or where it was proved to the satisfaction of the court that the appellant had paid the judgment debt in full the court was entitled to annul the adjudication order (see section 105 of the Act). In the instant case, the appellant had not paid his debt and the other grounds on which he was relying had not been established to the satisfaction of the court to warrant an annulment of the adjudication order.

The learned judge who heard the motion found that it lacked merit and therefore dismissed it. This court sees no reason to interfere with such finding and would accordingly dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *John Ang & Co.; Ng Ek Teong & Partners.*

KOW NAN SENG v. NAGAMAH & ORS.

[F.C. (Lee Hun Hoe C.J. Borneo, Wan Suleiman & Salleh Abas F.JJ.) July 7 & September 5, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 169 of 1979]

Torts — Negligence — Person injured in road accident — Injuries sustained were minor fractures — Application of complete plaster cast — Lack of proper skill in application of treatment and lack of observation in monitoring response to treatment — Inadequate blood circulation leading to gangrene and amputation of leg — Liability of medical officer and Government for damages — Medical negligence.

Damages — Leg-amputation — General damages $37,500 awarded.

In this case one Arasappa, the 2nd respondent, was injured in a road accident between a motor cycle ridden by him and a motor car driven by the appellant. He sustained minor fractures and was taken to hospital where he was attended by a medical officer, the 3rd respondent. A complete plaster cast was applied to the leg but owing to lack of proper skill in the application and observation in monitoring

of the treatment there was inadequate blood circulation which led to gangrene, necessitating the amputation of the leg. The 2nd respondent claimed damages against the appellant, the 3rd respondent and the Government in respect of the initial injuries caused to him by the road accident and the final incapacity resulting from the hospital treatments given to him. The appellant admitted liability as regards the road accident but denied it as regards the amputation of the 2nd respondent's leg. The learned trial judge absolved the medical officer (3rd respondent) and the Government (4th respondent) from any blame and held the appellant solely to blame. The appellant appealed.

Held: (1) the evidence in this case showed that the 2nd respondent was not given fair and reasonable standard of care and skill expected of an ordinary competent medical practitioner. The breach of care consisted of lack of proper skill in the application of the treatment and lack of proper observation in monitoring the patient's response to the treatment after it was given;

(2) the proper apportionment of damages should be as follows: (i) the $37,500 general damages should be borne by the appellant and the 3rd and 4th respondents in the proportion of 20% and 80% respectively; (ii) the $12,320 special damages should be apportioned in the same proportions as the general damages and (iii) the $33,100 loss of future earnings to be wholly borne by the 3rd and 4th respondents.

Cases referred to:-

(1) *R.* v. *Bateman* [1925] All E.R. 45.

(2) *Bolam* v. *Frien Hospital Committee* [1957] 2 All E.R. 118.

(3) *Elizabeth Choo* v. *Government of Malaysia & Anor.* [1970] 2 M.L.J. 171.

(4) *Baylill* v. *Gringley Children's Hospital Lancet,* cited in *Mehta,* Medical Law and Ethics in India, 1963, p. 207.

FEDERAL COURT.

Chandran Nair for the appellant.

S.C. Chan for the 2nd respondent.

Datuk Abu Mansor bin Ali (Senior Federal Counsel) for the 3rd & 4th respondents.

Salleh Abas F.J. (delivering the judgment of the Court): For the purpose of this judgment Respondent No. 2 is referred to as "the respondent", Respondent No. 3 as "Dr. Susila" and Respondent No. 4 as "the Government".

The respondent sustained a comminuted fracture of left tibia and a fracture of left clavicle. These injuries were caused by a road accident between a motor cycle NC 2668 ridden by him and a motor car NG 6322 driven by the appellant. The accident occurred on October 24, 1975 at about 6.30 p.m. near the junction of Jalan Genuang and Jalan Sia Her Yam, Segamat in the State of Johore. He was then immediately taken to Segamat District Hospital, where he was attended to by Dr. Susila. After an x-ray was taken of his left leg a complete plaster cast, known as POP long boot was applied to the leg. During the night he had great pain in the leg and so was given a 75 mg. pathedine injection. Despite the injection the pain did not cease but continued with greater severity. On the next day, i.e. October 25, at about 8.00 a.m. Dr. Susila and Dr. S. Kumarappan, the Consultant Surgeon attached to the Hospital saw the respondent in the ward. The respondent complained of having pain to the two doctors, and except for another 75 mg. pathedine injection nothing was done to the respondent's leg until 4.00 p.m. on that day, when a second x-ray was taken. On the following day, i.e. October 26 Dr. Susila saw the respondent again and on noticing that the POP was a "bit tight", she ordered it to be slit and when she found that the slitting was insufficient to relieve the pressure which had been building up within the plaster cast due to swelling the respondent was taken to the operation theatre to be attended to by Dr. Kumarappan. It was then that Dr. Kumarappan found that the respondent could no longer move his left toe, which was cold and unpulsated. He immediately performed an operation to remove the POP completely. After the removal the respondent was sent on the same day to Malacca General Hospital as an emergency case. At this Hospital another kind of operation known as investigation of arteries was performed on the respondent. After this operation his leg improved slightly but later turned gangrenous and as a result the leg had to be amputated. The amputation was at first done below the knee on November 8, 1975, but due to infection a second amputation above the knee was performed on November 27, 1975. Finally the respondent was discharged from the Hospital on December 24, 1975.

He sued the motor car driver, i.e. the appellant, Dr. Susila and the Government for damages in respect of the initial injuries caused to him in the road accident and the final incapacity resulting from the Hospital treatments given to him. The appellant admitted liability as regards the road accident but denied it as regards the amputations of the respondent's leg. The learned judge absolved Dr. Susila and the Government from any blame and held the appellant to be solely responsible for the misfortune of the respondent. He therefore awarded damages for the respondent solely to be paid by the appellant. Grieved by this decision, the appellant now appeals to us.

The question before us is whether Dr. Susila and the Government, in whose Hospitals the respondent was treated and who employed Dr. Susila were in any way guilty of negligence in applying the POP long boot to the respondent's leg. If so, damages awarded to the respondent must be apportioned between the appellant on the one hand and Dr. Susila and the Government on the other.

The law on medical negligence is clear enough but its application is often difficult as facts and circumstances are not the same in each case and so must vary from case to case. For the purpose of this judgment it is necessary to state, even if briefly, the law on the subject so as to guide us in determining on the facts of this case whether Dr. Susila and the Government are guilty of negligence. A doctor's duty towards his patient is that he has to exercise a fair and reasonable standard of care and skill, i.e. the skill of an ordinarily competent medical practitioner. (*R.* v. *Bateman*(1)). Taking this as a guide we now proceed to examine the facts.

The gangrene which caused the amputations of the respondent's leg was the result of vascular insufficiency, which in layman's language means inadequate circulation of blood. This was the concurrent opinion of Dr. K.R. Ramaswami, who attended to the respondent at Malacca General Hospital and Dr. Mahmood

Merican, a Consultant Orthopaedic Surgeon who was consulted by the respondent's solicitors. This opinion was not at all disputed by either Dr. Susila or Dr. S. Kumarappan, the Consultant Surgeon at the Segamat District Hospital. The next question is what caused the inadequate blood circulation. According to medical reports exhibited in this case there was no evidence of inadequate blood supply at the time of the respondent's admission to Segamat District Hospital and the application of POP long boot. That the relevant blood vessels were not injured at the time was confirmed by the report of Dr. K.R. Ramaswami who performed the exploration of the arteries at Malacca General Hospital. At the time when the respondent arrived at Malacca General Hospital on October 26, 1975, Dr. Ramaswami noted the following: —

"1. Left leg — swollen from knee downwards. No sensation below lower two thirds of leg.
2. Skin was cold and pale. Pulsation in the left leg absent. Tenderness and swelling on left clavicle area.
3. Abrasions over left shoulder, left iliac crest and both feet."

These conditions were all signs of serious inadequacy of blood supply to the leg and exploration of the main arteries to the leg was done with a view to improving the circulation. Indeed the very reason why Dr. S. Kumarappan decided to send the respondent to Malacca General Hospital was because on October 26, his blood circulation was poor. Observation to this effect was noted on the Segamat District Hospital's record exhibit P4 at page 1. The record says:—

"Patient transferred to Malacca for open reduction. Patient not able to move leg because of poor circulation."

Thus it is abundantly clear that the inadequate circulation must have occurred gradually after the application of POP long boot. It did not occur before this treatment, because on admission there was no such sign and moreover the blood vessels were not injured. This means that the inadequate circulation, causing the gangrene was itself caused by the application of a complete plaster cast.

Counsel for the appellant submitted to us strongly that since the POP caused poor circulation which in turn caused gangrene the application of POP on the respondent's left leg was a mistake from the very beginning and should not have been applied. Dr. Mahmood Merican said in his report that the application of POP "carries a definite risk of causing circulatory embarrassment to the leg and so most Orthopaedic Surgeons would split the plaster immediately or apply only a plaster slab instead of a complete cast so as to avoid excessive pressure built up from swelling." He further amplified this statement in his oral testimony that where a complete cast is applied, as in this case, the greatest risk to circulation is the first 6 to 12 hours of the application and that the first sign of pressure is pain and that if the patient has pain the cast must be split and that when he cannot move his toe, it is an indication of fairly advanced state of inadequate circulation. According to him it would then be necessary to split or even remove the cast completely and if no improvement is shown within two hours of the splitting or removal further measures should be taken including surgery in order to restore circulation. This evidence is not at all challenged by anyone in this case. Thus counsel submitted that the application of a complete cast, i.e. POP, instead of a plaster slab is a dangerous undertaking since it invites pressure causing poor circulation of the blood. He submitted that this is negligence. The treatment in this case could be either a complete cast or a plaster slab. The practice in Malaysia is to apply a complete cast. Dr. Mahmood Merican disputed this current Malaysian practice to be a correct one and maintained that a plaster slab should be used and that this method is within the knowledge of an ordinary doctor, presumably like Dr. Susila.

There may be differences of opinion as to the types of plaster casts to be applied in the treatment of the type of injuries sustained by the respondent, but the choice of a treatment which is the standard medical practice is not by itself a negligence, *Bolam* v. *Frien Hospital Committee*[2] and *Elizabeth Choo* v. *Government of Malaysia & Anor.*[3] Thus the application of POP long boot to the respondent's left leg is not in itself a negligent act. However, since the application of POP carries with it an inherent danger to blood circulation, the question is whether there was fair and reasonable standard of care taken after POP was applied to see that there would be no problem of poor blood circulation. If there was such standard of care Dr. Susila and the Government would not be liable, but if there was not, they would be liable and the damages awarded should be apportioned.

It is clear that Dr. Susila appreciated the risk of applying a complete cast, because a note written presumably by her on page 3 of Exhibit 4 at the time of the treatment being given says: —

"POP long boot applied after slight reduction. Figure of 8 applied. To watch for swelling."

We know that the impairment to the blood circulation occurred gradually between the evening of October 24 after the POP was applied and the morning of October 26 when Dr. S. Kumarappan found it necessary to remove the cast completely as its slitting did not relieve the pressure. During this period the respondent was in pain. There was no denial that the Hospital authorities knew of the pain suffered by the respondent. Yet the only response which the Hospital made to the shouts of pain was to give two 75 mg. pathedine injections: one dose in the night of October 24 and another in the morning of October 25. Surely pain is the reflection that something was amiss with POP as applied, and surely Dr. Susila and Dr. S. Kumarappan must have known that circulation of blood was being interfered with by the pressure built-up within the plaster cast. When these two doctors saw the respondent the next day on October 25 at about 8.00 a.m. it was almost, if not more than, twelve hours had lapsed since POP was applied. Dr. S. Kumarappan admitted in the evidence that if the patient complained of pain he would have removed the plaster. But why did he not do it? As to this it is difficult to accept, however, that either he or Dr. Susila was not aware that the respondent was having pain, in view of the two pathedine injections and the second x-ray ordered by him at 4.00 p.m.

on that day. In our view the second x-ray must have been ordered because Dr. S. Kumarappan must have known from the complaints of pain by the respondent that there was problem to blood circulation and that the POP treatment had given this trouble to the patient. Yet nothing was done to the respondent's leg at all on October 25.

Further it is amazing that the treatment sheet exhibit P4 at page 4 carried a note stating that on October 25 "circulation good", when the patient kept on complaining of severe pain. This pain cannot be due to fractures, because according to Dr. Mahmood's evidence pain from fractures after being held by the cast should not be severe since the cast prevents the movement of the fractured bones. Thus the pain complained by the respondent which was so severe that pathedine injections had to be administered in order to kill it, must have been due to insufficiency of blood circulation and something therefore should be done to the plaster, either slit it open or remove it completely. Thus the note saying that on October 25 circulation was good could not have been correct. Worse still are the notes made on October 26. There are two notes made on that date. The first states: —

"POP bit tight. Circulation good. Not able to move toe — slit of POP ... (illegible)."

This note presumably must have been made at the time when Dr. Susila observed the POP to be a bit tight and so ordered its slitting. The second note made on that day is at page 5 of Exhibit P4 stating: —

"Plaster too tight. Not able to move toe. Toe feels cold."

This note must have been made at the time of the removal of POP after it was discovered that the slitting was not enough to solve the problem. If circulation was really good, why the plaster cast became tight, at first "a bit tight" and later "too tight"? and why did the toe become immobile and turned cold? No impropriety was ever suggested regarding the recording of these notes and as such the only reason one can conclude why these notes were so written, when they should have been otherwise, must have been either carelessness or indifference on the part of the Hospital concerned. We cannot think that these two doctors did not have the elementary knowledge described by Dr. Mahmood Merican that pain is the first sign of circulatory embarrassment and that the immobility of toe is the sign of advanced state of vascular inadequacy. We think that even a layman could appreciate this. These notes are not alone in recording the perfect state of circulation, when in fact it was problematical. The nursing chart (*vide* page 6 of Exhibit P4) which recorded at close intervals the blood circulation in the respondent's left leg from the time of his admission to that of his departure to Malacca General Hospital is even more exaggerated. The notes recorded on this chart without a single exception are that circulation was good, even at the very hour when the respondent was removed to Malacca General Hospital.

Thus, in our view, the evidence in this case clearly shows that the respondent was not given fair and reasonable standard of care and skill expected of an ordinarily competent medical practitioner. The breach of care here consists of lack of proper skill in the application of the treatment and lack of proper observation in monitoring the patient's response to the treatment after it was given so that by the time the Hospital came to realise that something was wrong it was already too late. Malacca General Hospital tried to repair the damage done, but its effort was unsuccessful because the damage done was by then already beyond repair. It was on October 25 that the respondent most needed the care and attention and yet on that day nothing was done to his leg apart from a second x-ray. The claim that the two doctors were busy on that day because it was an operation day is not an excuse.

In this case the respondent went to Hospital with comparatively minor fractures, such that even Dr. Susila thought that the patient would be discharged after a few days observation and that he would be incapacitated only for about two months. The Consultant Surgeon likewise said that in this case the patient would take about ten to sixteen weeks to recover fully. Now as a result of the application of POP long boot his leg was amputated twice, which amputations rendered him a permanent disability. The resulting amputations were not expected or even foreseen by the two doctors, because the injuries were fairly slight. Is this not a case of bad treatment in which a patient went in with a fairly good leg and came out without it? The case seems to be almost on all fours with *Baylill* v. *Gringley Children's Hospital*[4] tried by Mr. Justice Stable who held the Hospital guilty of negligence where a child who went in with a healthy left leg came out a cripple.

In view of what we have discussed above we conclude that the Respondents No. 3 and No. 4 are guilty of negligence as regards the resulting incapacity caused to the Respondent No. 2, Arasappa s/o A. Palanisamy. There must therefore be an apportionment of damages between the appellant on the one hand and the Respondents No. 3 and 4 on the other hand. Having regards to the facts and circumstances of this case, we feel that the proper apportionment should be as follows: —

(a) the $37,500 general damages, which carries interest at 6% p.a. from the date of the writ should be borne by the appellant and Respondents No. 3 and No. 4 in the proportion of 20% and 80% respectively.

(b) the $12,320 special damages carrying interest at 3% p.a. from the date of the road accident is to be apportioned in the same proportions as the general damages, and

(c) the $33,100 loss of future earnings is to be wholly borne by the Respondent Nos. 3 and 4.

The appeal is therefore allowed with costs and the deposit should be refunded to the appellant.

Appeal allowed.

Solicitors: *Thevin Chandran Siva & Chong; Murphy & Dunbar.*